U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11028469

Date: AUG. 11, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. With the appeal, the Petitioner submits a brief asserting that he is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or

> educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge, and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s)

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

The Director concluded that the Petitioner qualifies as a member of the professions holding an advanced degree or its equivalent.[4] The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.[5]

A. Substantial Merit and National Importance of the Proposed Endeavor

In the initial letter, the Petitioner stated that he "intends to advance his career as a [s]oftware [d]eveloper, developing information systems for businesses."[6] The Petitioner further explained that he has "gained extensive experience, skills, and contacts in the field of [s]oftware [d]evelopment, and knowledge that will allow me to help companies in the United States, more specifically U.S. companies doing business in Brazil." The Petitioner indicated that he will "use the knowledge I have acquired to work on large scale [s]oftware [d]evelopment projects, where I would define strategies, methodologies, and tools that will be implemented."[7]

The Director issued a request for evidence (RFE) and noted that the Petitioner's statements are vague, and that the Petitioner does not "articulate a plan for working in the field of software development at a level that is commensurate with national importance," and that the record does not demonstrate eligibility for a national interest waiver.

In response to the Director's RFE, the Petitioner explained that he intends to work as a "software developer and IT consultant, [] in which he will keep designing, creating, and developing products and tools that benefit U.S. companies." He indicated that he would accomplish this by "prospecting" for employment opportunities with companies in the United States, and by establishing himself as a self-employed consultant. He also stated that he will also "evaluate the possibility of opening a software and game development company."

For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently shown the national importance of his proposed endeavor.

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[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] The Petitioner has a foreign bachelor's degree and at least five years of progressive post-baccalaureate experience.

[5] The Petitioner submitted evidence to establish his eligibility for the benefit sought in the petition. While we may not discuss every document submitted, we have reviewed and considered each one.

[6] To illustrate his future software development activities, the Petitioner initially provided a list of eleven bulleted job duties which he quoted verbatim from the Department of Labor's Occupational Information Network (O*NET) summary report for "Software Developers, Applications." While this type of description may be appropriate when defining the range of duties that may be performed within an occupational category, it does not adequately convey the substantive work that the Petitioner will prospectively perform. *See* https://web.archive.org/web/20180201191102/https://www.onetonline.org/link/summary/15-1132.00, (last visited August 11, 2021).

[7] We note that, while information about the nature of the Petitioner's proposed endeavor is necessary for us to determine whether he satisfies the *Dhanasar* framework, he need not have a job offer from a specific employer as he is applying for a waiver of the job offer requirement.

In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." *Id.* at 889. The record, however, does not include evidence of the Petitioner's proposed software development projects in the United States, or other information about the specific consulting work the Petitioner will undertake in this country. For example, he does not sufficiently explain or demonstrate how his future software development work stands to rise to the level of national importance within the information technology field. The record does not show, for instance, that the specific work the Petitioner proposes to undertake will offer original innovations to advance the industry, or that it otherwise has wider implications in his field. In denying the petition, the Director observed that the Petitioner documented and emphasized the general importance of the information technology field to the United States, but the evidence did not sufficiently articulate how his particular proposed endeavors would have national importance beyond his prospective employing organizations and their clients. We agree.

On appeal, the Petitioner provides evidence that he incorporated an IT consulting business in July 2020, in which he holds the chief technology officer (CTO) role for the organization. He asserts that his new company will "provide specialized IT services to American companies, in any sector, improving their business intelligence and IT tools," and notes that he intends to "hire a team of U.S. workers and related support staff." The Petitioner filed his petition in April 2018. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

Regardless, we note that these generalized statements are insufficient to support a finding that he meets the first prong under *Dhanasar*. To satisfy the national importance requirement, the Petitioner must demonstrate the "potential prospective impact" of his work. While he alludes to the economic benefits that will be created through his business, the record does not show that benefits to the U.S. regional or national economy resulting from his IT consulting firm would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. As the Petitioner has not established that his endeavor supports a finding of national importance, he has not met the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner. The Director determined in his denial that the Petitioner is well positioned to advance the proposed endeavor. For the reasons discussed below, we withdraw the Director's determination in this regard, as the evidence is insufficient to demonstrate that the Petitioner is well positioned to advance his software development endeavor under the second prong.

The record includes the Petitioner's resume, academic credentials, information technology training certifications, and letters from his former work colleagues and employers. The evidence demonstrates that the Petitioner has obtained education and training in information technology, and has over ten years of experience as a software developer, but he has not shown that he has experienced a record of success within the information technology field; a tangible model or plan for future activities;

demonstrated progress towards achieving the proposed endeavor; or that potential customers, users, investors, or other relevant entities or individuals are interested in his work.

On appeal, the Petitioner asserts that he "has led several IT projects for major companies, which in turn have significantly contributed to the economy." However, the significance of these projects, their economic impacts, and his role therein have not substantiated by the evidence of record.[8] For instance, the Petitioner highlights his work for a [redacted] company, V-, discussing his involvement in a project of "high-level complexity, consistent in high rates of stock rupture and lack of controls for non-coded items," noting that he held a key role "in building a solution that became a world reference for all large companies with the SAP system, which received high recognition by [V-]." Mr. P-, an IT specialist and project manager for V-, notes in his letter that the Petitioner "did an excellent job while working on a project messaging output to create a panel in the SAP Cloud Platform (SCP) that purchasers would use to monitor whether suppliers were receiving messages from [V-] about our bidding processes and/or purchase orders." Mr. P- states that the Petitioner also worked on a tracking project, "which consisted of creating a portal in the [SCP] so [V- users can] monitor the delivery status of material. . ." While Mr. P- was complimentary of the Petitioner's work, he made no mention of the Petitioner's development of "a solution that became a world reference for all large companies with the SAP system," nor did he indicate that the Petitioner led IT projects for V- during his tenure there. Here, the record lacks evidence establishing the Petitioner's assertions.[9]

The Petitioner further asserts on appeal that during his work at [P-], "a world known company in the [redacted] industry – the Petitioner was responsible for the development of automation in the process of opening and documenting new [redacted]" Ms. V-, indicates in her letter that she was employed by P- as an SAP FICO consultant, and worked with the Petitioner who was responsible for "developing the solution and creating the technical specifications" for projects that she was involved in. The Petitioner describes the duties he performed during this assignment, which included the "creation of technical specification (TS) based on the functional specification," "support internal ticket correction," "correction of Z programs," "interacting with functional team to solve the issues in the given object," and "answering calls from users requesting adjustments and debugging of programs." While these duties reflect commonly performed information technology tasks, they do not establish the asserted significance of the Petitioner's role within P-'s software development projects.[10]

We examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed endeavor, a record of success in similar efforts, or generation of interest among relevant parties supports a finding that he or she is well positioned to advance the proposed endeavor. *Id.* at 890. Considering the totality of the record, we conclude that the Petitioner is a competent software developer. However, the submitted evidence is insufficient to demonstrate that he has achieved a level of past success or progress that would render him well positioned to advance his proposed endeavor. Therefore, he has not established that he satisfies the second prong of the *Dhanasar* framework.

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[8] It is the Petitioner's burden to prove by a preponderance of evidence that it is qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

[9] The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[10] *Id.*

C. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, the third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. Because the Petitioner has not established the national importance of his proposed endeavor and that he is well positioned to advance his endeavor as required by the first and second prongs of the *Dhanasar* framework, he is not eligible for a national interest waiver. Accordingly, discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.